

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

| | | |
|--------------------------|---|--------------------------|
| IN THE MATTER OF: |) | |
| |) | DIVISION OF WATER |
| |) | POLLUTION CONTROL |
| |) | |
| JOHN RANKIN |) | |
| |) | |
| |) | |
| |) | |
| RESPONDENT |) | CASE NO. 07-081 |

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Division of Water Pollution Control,
and states:

PARTIES

I.

Paul E. Davis is the duly appointed director of the Division of Water Pollution Control (hereinafter the "division") by the commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "department").

II.

John Rankin (hereinafter the "Respondent") is doing business as H & A Joint Venture on property (hereinafter the "site") located on Highway 12 South in Cheatham County, Tennessee. The property is identified on Cheatham County Property Map 65 as

Parcel 46. Service of process may be made on the Respondent at 1335 Highway 12 South, Ashland City, Tennessee 37015.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of the Water Quality Control Act of 1977 (hereinafter the "Act"), Tennessee Code Annotated (T.C.A.) § 69-3-101 et seq, has occurred or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as Chapters 1200-4-3-4 of the *Official Compilation: Rules and Regulations of the State of Tennessee*. Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director of the division any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a "person" as defined by T.C.A. § 69-3-103(20) and, as herein described, has violated the Act.

V.

The unnamed tributary to the Cumberland River, referred to herein, is “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. In accordance with Department Rule 1200-4-4, “Use Classifications for Surface Waters,” these water bodies have been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

VI.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the Tennessee General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI). Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

FACTS

VII.

On February 9, 2007, the division conducted a complaint investigation at the site and discovered land disturbance activities in excess of one acre had occurred at the site and that approximately 1,500 linear feet of jurisdictional stream had been buried under fill material as part of the construction activities. The unauthorized stream alteration resulted in an impoundment approximately 12 acres in size. It was observed that some of the fill material utilized at the site contained construction and demolition waste in addition to rock and soil. A subsequent file review revealed that no application had been made, nor had authorization been granted, for the land disturbance activity or the stream alterations.

VIII.

On February 12, 2007, the Division of Solid Waste Management was informed of the existence of the fill site due to the possibility of cross-jurisdictional violations having occurred.

IX.

On February 16, 2007, the Ashland City Codes Department provided the division with copies of a Stop Work Order that had been issued by the City on December 30, 2006, requiring that fill operations at the site cease immediately. The Stop Work Order informed the owner and contractors working at the site that unsuitable fill materials utilized in the fill operations would have to be removed, and that all State regulations would have to be complied with before the Order could be lifted. A police report regarding illegal dumping activity on the same date was also provided to the division.

X.

On February 21, 2007, a Notice of Violation (NOV) was issued to the Respondent for performing the unauthorized stream alteration and unpermitted construction activity observed during the February 9, 2007, complaint investigation. The NOV required the Respondent to submit a stream restoration plan addressing the removal of the fill material and the restoration of the stream to its original condition. The stream restoration plan was required to be submitted no later than 30 days after receipt of the NOV.

XI.

On February 21, 2007, the Respondent requested a meeting with division personnel regarding the violations observed at the site. The Respondent stated that he wanted to be cooperative and provided a history of operations at the site. He acknowledged that fill material began to be placed on the property in 2005, and provided photographs of these operations dated September 25, 2005. The Respondent stated that he had been advised by a consultant at the onset to contact the division for a jurisdictional determination on the stream, but had decided to proceed with the fill activities without contacting the division. The Respondent admitted to being familiar with the division's permitting requirements, and stated that the decision to proceed without authorization was a foolish one on his part. The Respondent informed the division that the purpose of the fill activities was to bring the entire site up to grade, and then sell the property to an individual that wished to build a manufacturing facility. He admitted that this would involve burying a stream channel that had been mapped as an intermittent stream on a U.S. Geological Survey topographic map, and brought such a map to the meeting and identified the portion of the stream that had been buried by the fill activities. The Respondent added that he had tried to stop the fill

activities a year ago but dumping continued to occur without his authorization, by contractors who had become familiar with the site's location and wished to use it as a disposal site for excess materials from their construction projects. The Respondent claimed that the unsuitable materials used for fill at the site, including construction and demolition wastes, were deposited by the unauthorized dumpers. The Respondent further stated that the reason he had requested to meet with the division was to admit his mistake, and try to arrange for a solution that would not involve removing the fill material and restoring the stream. He suggested that mitigation be considered instead, but was informed by the division of the hydrological consequences of improperly impounding the stream. The division further instructed the Respondent to begin working on a restoration plan.

XII.

On April 20, 2007, division personnel performed a follow-up inspection at the site. It was observed that pockets of fill material had been removed in various areas, but the purpose for this could not be positively determined. The stream restoration plan required by the February 21, 2007, NOV and meeting with the Respondent had not been received by the division.

XIII.

As of June 9, 2007, the division has not received the stream restoration plan required by the February 21, 2007, NOV and meeting with the Respondent. During the course of investigating this matter, the division incurred damages in the amount of FIVE HUNDRED TWENTY ONE DOLLARS AND SIXTY FOUR CENTS (\$521.64).

VIOLATIONS

XIV.

By altering waters of the state without authorization under an ARAP, and by performing construction activities without coverage under the TNCGP, the Respondent has violated T.C.A. §§ 69-3-108(a)–(b), 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XV.

By failing to install erosion prevention and sediment control devices at a land disturbance activity, the activity described herein did or was likely to cause an increase in the discharge of wastes into the waters of the state. Therefore, the Respondent has violated T.C.A. Sections 69-3-108(b) and 69-3-114(b), as referenced above.

XVI.

By causing a condition of pollution in the unnamed tributary to the Cumberland River, the Respondent has violated T.C.A. §§ 69-3-108(b), referenced above, and 69-3-114-(a).

§ 69-3-114(a):

It is unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in Section 69-3-103 (22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVI.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-107, 109, 115–16, I, Paul E. Davis, hereby issue the following ORDER AND ASSESSMENT to the Respondent:

1. The Respondent shall implement appropriate Erosion Prevention and Sediment Control (EPSC) measures to ensure that no eroded material leaves the site and enters waters of the state. Documentation that EPSC measures have been implemented and a request for division approval is to be sent within 30 days of receipt of this Order and Assessment to the manager of the Division of Water Pollution Control located at the Nashville Environmental Field Office (NEFO), 711 R.S. Gass Boulevard, Nashville, TN 37243, and a copy shall also be sent to the manager of the Enforcement & Compliance Section, Division of Water Pollution Control, located at 401 Church Street, L&C Annex 6th Floor, Nashville, TN 37243.
2. The Respondent shall maintain appropriate EPSC measures to ensure that no additional material leaves the site and enters waters of the state. The EPSC measures shall be maintained until permanent erosion preventive vegetative cover is established.
3. The Respondent shall, within 30 days of receipt of this Order and Assessment, submit a corrective action plan (CAP) to restore the affected segment of the

stream, specifically addressing the removal of the unauthorized fill material. The CAP is to be submitted to the manager of the Division of Water Pollution Control located at the NEFO, and a copy shall also be sent to the manager of the Division of Water Pollution Control's Enforcement & Compliance Section, at the addresses provided in Item 1.

4. The Respondent shall, within 120 days of receipt of approval of the restoration plan, complete all work identified in the approved plan and submit written documentation of completion to the manager of the Division of Water Pollution Control located at the NEFO, and a copy shall also be sent to the manager of the Division of Water Pollution Control's Enforcement & Compliance Section, at the addresses listed in Item 1.
5. The Respondent shall, within 6 months of receipt of this Order, provide documentation of attendance and successful completion of the department's Erosion Prevention and Sediment Control Workshop, for all employees who manage or oversee construction projects, to the Water Pollution Control manager at the NEFO and a copy to the E & C manager at the addresses provided in Item 1.
6. The Respondent is hereby assessed a CIVIL PENALTY in the amount of NINETY SIX THOUSAND TWO HUNDRED FIFTY DOLLARS (\$96,250.00), payable as follows:

- a. The Respondent shall, within 30 DAYS of receipt of this Order and Assessment, pay to the division TWENTY THOUSAND DOLLARS (\$20,000.00).
 - b. The Respondent shall pay FIFTEEN THOUSAND DOLLARS (\$15,000.00) to the division in the event the Respondent fails to comply with Item 1 above, to be paid within 30 days of default.
 - c. The Respondent shall pay FIFTEEN THOUSAND DOLLARS (\$15,000.00) to the division in the event the Respondent fails to comply with Item 2 above, to be paid within 30 days of default.
 - d. The Respondent shall pay TWENTY THOUSAND DOLLARS (\$20,000.00) to the division in the event the Respondent fails to comply with Item 3 above, to be paid within 30 days of default.
 - e. The Respondent shall pay TWENTY FOUR THOUSAND DOLLARS (\$24,000.00) to the division in the event the Respondent fails to comply with Item 4 above, to be paid within 30 days of default.
 - f. The Respondent shall pay TWO THOUSAND TWO HUNDRED FIFTY DOLLARS (\$2,250.00) to the division in the event the Respondent fails to comply with Item 5 above, to be paid within 30 days of default.
7. The Respondent is hereby assessed DAMAGES in the amount of FIVE HUNDRED TWENTY ONE DOLLARS AND SIXTY FOUR CENTS

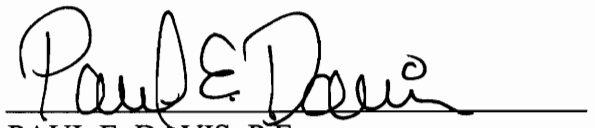
(\$521.64) payable within THIRTY (30) DAYS of receipt of this Order and Assessment.

The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director of the Division of Water Pollution Control may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the Respondent shall submit a written request to be received a minimum of 30 days in advance of the compliance date. The request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension will be in writing.

Further, the Respondent is advised that the foregoing Order and Assessment is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Order and Assessment will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on this 25th day of June 2007.


PAUL E. DAVIS, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the director at the address below a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment.

If the required written petition is not filed within thirty (30) days of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§ 69-3-109, 115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 et seq of the Uniform Administrative Procedures Act, and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible

for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made payable to “Treasurer, State of Tennessee,” and sent to the Tennessee Department of Environment and Conservation, Division of Water Pollution Control - Enforcement & Compliance Section, 6th Floor L&C Annex, 401 Church Street, Nashville, TN 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution Control, at the address above. All payments and correspondence should include the Respondent’s name and case number as shown on the first page of this Order and Assessment.